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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1957.

No. 1083

HARRY C. DANIELS, D/B/A HARRY C. DANIELS AND CO.,

Petitioner,

vs.

UNITED STATES OF AMERICA AND EZRA TAFT BENSON, SECRETARY OF AGRICULTURE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI.

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Harry C. Daniels, d/b/a Harry C. Daniels and Co., respectfully prays that a Writ of Certiorari may issue to the United States Court of Appeals for the 7th Circuit to review a judgment of that Court denying a petition to review a decision of the Secretary of Agriculture under the Packers & Stockyards Act, 1921, as amended. (7 U. S. C. 181 *et seq.*)

OPINION BELOW.

The opinion of the Court of Appeals appears in the certified copy of the transcript of the record immediately following page 336. It has not yet been reported. Pursuant to rule, it is appended to this petition. The opinion of the Secretary of Agriculture is found in the transcript at pages 314-322.

GROUNDS UPON WHICH JURISDICTION OF THIS COURT IS INVOKED.

(1) The judgment of the Circuit Court of Appeals was entered on March 14, 1957. (T following p. 336.)

(2) Petition for a rehearing in the Court of Appeals was denied on April 2, 1957. (T following p. 336.)

(3) The jurisdiction of this Court is invoked under Title 28, U. S. C., Sec. 1254.

QUESTIONS PRESENTED FOR REVIEW.

(1) Has the Court of Appeals so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an administrative agency, as to call for an exercise of this Court's power of supervision?

(2) Was the petitioner denied fair and equal treatment under the law?

(3) Was the decision harsh and the penalty excessive?

STATEMENT OF THE CASE.

The petitioner is a reputable businessman, fifty-six years of age, who has been engaged in the business of handling livestock continuously from his earliest youth; for the past twenty-five years, he has been in the livestock commission

business and his firm of Harry C. Daniels and Co. has been continuously in existence in the St. Louis National Stockyards for the past twenty years. (T 171.) The devotion of an entire life by petitioner to this business has enabled him, through the years, to gain the experience, knowledge, acquaintanceship and reputation necessary to the building of a business which today has gross annual sales in excess of $5,000,000.00. (T 226.) Petitioner's business is registered with the Secretary of Agriculture, under the Packers & Stockyards Act, 1921, as amended (7 U. S. C. 181 *et seq.*), as a marketing agency to buy and sell livestock on a commission basis at the St. Louis National Stockyards. Petitioner's business is conducted in the Stockyards Building at East St. Louis, wherein he employs four clerks and bookkeepers, and from cattle and hog pens and sheds leased to him by the Stockyards Company, wherein he employs hog and cattle salesmen and yardmen, who attend to the feeding, watering, sorting, weighing, grading and selling of livestock. (T 169, 173.) The customers of petitioner's business reside in a broad area around East St. Louis, including parts of the States of Missouri, Illinois, Iowa, Indiana, Arkansas and Kentucky; these customers are principally small farmers who have shipped their livestock to petitioner through the years. (T 172.)

On March 15, 1955, a complaint (Order of Inquiry) was filed against petitioner by the Director, Livestock Division, Agricultural Marketing Service. This complaint (T 2-7) charged petitioner with the wilful violation of certain Sections of the Packers & Stockyards Act, 1921, as amended, and consisted of three principal charges as follows:

(1) That, during the period from October 26, 1953 through August 27, 1954, petitioner made payments to several shippers by personal check, rather than by draft upon his trust account.

(2) That, during the period from November 1, 1953

through August 31, 1954, petitioner overcharged for feed furnished shippers, and,

(3) That petitioner during the period from May, 1954 through January, 1955, failed to furnish reasonable selling services to his customers.

A hearing was held upon said complaint at St. Louis, Missouri, before the hearing examiner appointed by the Secretary of Agriculture and the complaint was prosecuted by an attorney of the Agricultural Department. The hearing lasted for only two and a half days. The final order entered by the Judicial Officer of the Department of Agriculture was copied, substantially word for word, from the suggested findings of fact, conclusion and order prepared by the Department of Agriculture attorney. The hearing was conducted with such haste and speed that petitioner was prevented from introducing pertinent and relevant evidence, consisting of numerous drafts, checks, ledger sheets, books of account, feed bills and memoranda bearing upon each of the controversial points at issue; and petitioner was prevented from introducing witnesses who would have testified to transactions in question.

It was ordered by the Judicial Officer of the Secretary of Agriculture that, among other things, petitioner's registration be suspended for a period of four months. (T 332.)

Of tremendous importance, is the manner in which the Government prosecuted this case, which indicated a deliberate plan on the part of the Government investigators to suspend the petitioner from business, *even before the investigation was commenced.*

Despite the charges filed against the petitioner, the intense interrogation of many of his regular customers by Government investigators, the threats of Government investigators made upon petitioner's employees, and a thorough audit of petitioner's records and books over a ten month period, the Government was unable to establish one

single instance of fraud, chicanery or cheating by the petitioner. On the contrary, the investigation established that petitioner promptly remitted all funds to his customers on the day of sale. (T 253.) During the audit period petitioner's shippers' proceeds account was always in balance. His personal account was never overdrawn, and his bond of $52,000.00 approved by the Secretary of Agriculture, was never in jeopardy. (T 183-4.) The Government was unable, despite its inquisition, to secure one customer of petitioner to testify against him; and was forced once it had filed its charges to rest its entire case upon its own auditors and the willing testimony of petitioner's competitors.

A great part of the Government's case was based upon hearsay evidence, which would have been incompetent in a court of law or equity, and was only admitted because petitioner's trial counsel was not familiar with the rules of evidence and was unfamiliar with the manner in which administrative proceedings were conducted. Unfortunately petitioner's trial counsel did not introduce evidence which would have completely nullified the technical proofs offered by the Government.

The effect of the suspension order is to permanently terminate petitioner's business. This was admitted by Government counsel in oral argument before the Court of Appeals. The effect of the suspension order is to destroy petitioner's business which he has spent a lifetime establishing.

The jurisdiction of the Court of Appeals to entertain the petition to review, which petition was denied by the Court, rests on Section 2 of the Act of December 29, 1950, 64 Stat. 1129, 5 U. S. C. 1032.

ARGUMENT.

I.

The Court of Appeals Has Sanctioned Such a Departure from the Usual Course of Judicial Proceedings by an Administrative Agency as to Call for the Exercise of This Court's Power of Supervision.

The heart of the controversy is whether or not petitioner's business should be terminated by executive fiat based upon technical violations of complex rules and regulations issued by the Secretary of Agriculture which hurt no one. The further question presented is whether or not a businessman can have his business terminated by the executive department without a fair and complete hearing and a chance to introduce competent and relevant evidence which will answer the Government's technical charges.

Petitioner was accused of technical violations of certain sections of the Packers & Stockyards Act, 1921, as amended, and the rules of the Secretary of Agriculture made thereunder. He was charged with making payments to shippers out of personal funds rather than out of trust funds. He was charged with overcharging shippers for feed which he furnished their livestock. Because of the inadvertance of his counsel at the time of the hearing, evidence which petitioner had available in his books and records was not introduced to refute the charges. This evidence was submitted to the Court of Appeals and request was made that the case be returned to the Department so that this evidence could be put in the record. This request was refused. For instance, the petitioner can show that during the audit period in question, he issued 18,057 drafts totalling $4,716,695.06 and that he made payment out of his personal ac-

count in only 230 cases. He could show that he made these payments out of his personal account because of errors made by his bookkeeper in the preparation of drafts and that he made payment through his personal account so as not to delay the shippers' receipt of their money. He can further show that not one single shipper was incorrectly paid.

With regard to the charges that he overcharged shippers, he had evidence in his records which would show that he actually undercharged. This evidence, likewise, was not submitted before the administrator due to inadvertance of petitioner's trial counsel.

All this petitioner asked of the Court of Appeals was that he be given a right to adduce the evidence which he had so as to show the falsity of the Government's charges. This right was denied him by the Court of Appeals and it is respectfully submitted that such a denial, especially when it so vitally affects the fortune of a citizen of this country, amounts to such a departure from the accepted and usual course of judicial proceedings as to require this Court's supervision.

The Court of Appeals overlooked the dominant purpose of the Packers & Stockyards Act—which is, according to *U. S.* v. *Morgan*, 307 U. S. 183, the securing to patrons of the stockyards prescribed stockyard services at just and reasonable rates. Nothing in the Court's opinion indicates that the suspension of petitioner from business will fulfill this dominant purpose. If petitioner was insolvent, had shortages in his custodial accounts, had misappropriated funds, or made false weights, then there would be the danger of potential injury.

The Court of Appeals utterly failed and refused to recognize and take into consideration petitioner's reason for his actions in making his few payments by personal check. Although it was emphasized in petitioner's brief that he had

voluminous evidence to introduce to clearly show errors which were made in the preparation of drafts and the reason for his payment by personal check, the Court of Appeals arbitrarily refused to allow petitioner to show these reasons.

Thus, for this reason, the application of the rule in *Federal Trade Commission* v. *Raladam Company*, 316 U. S. 147, 152, quoted at page 4 of the Court of Appeal's opinion, to the effect that,

> "It is the duty of a regulatory agency to prevent potential injury by stopping unlawful practices in their incipiency,"

is most harsh and unrealistic. There is nothing in the record to establish that the activities of the petitioner were potentially injurious to the shippers. The record shows that the shippers were all promptly paid, that petitioner's shippers' proceeds account was constantly in balance and his bond was never in jeopardy.

The statement by the Court of Appeals at page 3 of its opinion referring to the overcharges for hog feed during the audit period and the emphasis which the Court placed upon such overcharge completely ignores the facts which petitioner has, which were not introduced in evidence, showing that petitioner actually undercharged for the period from 1947 to 1953. Moreover, the statement by the Court that,

> "The respondent failed to comply with the request of the Livestock Division to refund overcharges to the shippers,"

is a reaffirmation of a complete and absolute erroneous finding on the part of the hearing officer. Here again, petitioner has evidence to prove that he started remitting overcharges immediately upon being notified, and that he undercharged for an ensuing period more than he had overcharged pre-

viously. And the record shows that this manner of repayment was in compliance with procedure outlined by Government officials administering the Act.

We respectfully submit that this Court should look into the manner in which the Government prosecuted this case. Affidavits which petitioner appended to his brief in the Court of Appeals prove a deliberate plan on the part of the Government investigators to suspend the petitioner from business, *even before the investigation was commenced.* These affidavits establish that Government investigators told petitioner's customers and employees, at the commencement of their investigation that the petitioner was a "crook", that in a short time, "They were going to put Mr. Daniels out of business.", that his employees, "had better start looking for another job now, as it will be better for you than waiting until we put him out of business.", and that his employees were "liars".

Is it not time that this Court do something about the manner in which citizens of this country are set upon by administrative officials from Washington and their business ruined, terminated or closed without their recourse to a proper hearing in the courts of this country? Is it not time that the judicial power of this country was used to protect the citizen from the arbitrary and capricious action of an administrative official? It is time for the Court to assail the arrogance of administrative officials who tell a Federal Court that the imposition of a sanction "is peculiarly a matter for the exercise of administrative discretion" (Government brief 33), and that the "function of drawing inferences from the evidence is for the administrative agency." (Government brief 64.) Has the Federal Judiciary abrogated its powers to the point where the executive branch can demand that its fiat be approved?

II.

The Petitioner Was Denied Fair and Equal Treatment Under the Law.

In the Court of Appeals petitioner's attorneys showed that the suspension of petitioner's business for four months was most harsh, oppressive and excessive in view of the Judicial Officer's rulings in other cases in recent years. The last 24 cases decided by Thomas J. Flavin, the Judicial Officer in similar situations, were set forth in petitioner's brief. In every one of those cases, the marketing agency involved committed absolute injustices upon one or more of their customers. And yet of the 24 cases, in only 11 was the license suspended and in all but two of these 11 cases the suspension was held in abeyance. These cases involved insolvency, misappropriation of shippers' money, shortages in custodial accounts, selling livestock for speculative purposes, falsifying records, submitting accounts on false or fictitious names, assessing excess charges, making false weights, falsely billing customers, and making or giving kickbacks.

The record in the instant case positively shows that the petitioner was solvent at all times, that his bond was never in jeopardy, that his drafts and checks were paid upon presentation, that he didn't speculate with shippers' livestock, that he did not make false weight records or reports. That, in short, he did nothing that others have been judged for doing and still allowed to continue in business—yet petitioner's license is to be suspended.

We stand before the bar of this Court and submit that, in all fairness, an administrative agency should exhibit some consistency in its execution of the legislative mandate. After all, what is right is right, the punishment should fit the crime.

The Court of Appeals did not see fit anywhere in its pinion to comment upon this point. Is the application of ne law so rigid and technical—so mathematical—that it equires a Federal Court to approve administrative action, o matter how technical the proofs? Is there no such thing s a "more serious offense"? Are people who are set up y administrative officials never entitled to have the court onsider whether the penalty fits the crime? Does admin-trative decision require approval without applying any est of "reasonable relationship"?

III.

The Decision Is Harsh and the Penalty Excessive.

The gist of the Government argument, both in its brief nd orally, consisted of telling the Court of Appeals that hat Court had "nothing to do with the question of severity f the penalty." Again we ask this Court: Is our Federal ourt system so weak, is its jurisdiction so insignificant, hat an administrative sanction can be imposed with im-unity? The result of the Government's suspension order tantamount to confiscation. Suspending a business op-ration such as petitioner's which has been in existence or over twenty-five years, which has been built upon a eputation of honesty and fair dealing through those years, nd wherein not one single dissatisfied customer was found, the most drastic and surgical method of punishment nown. The methods prescribed in the Packers & Stock-ards Act for the enforcement of the Secretary's orders Sections 314 and 315), are adequate to enforce compliance ithout confiscation. The enforcement adopted here is nuch harsher than any criminal law.

The Government quoted from *Weiz and Company* v. *Brannon*, 171 F. 2d 232:

"The administrative decision as to the remedy should

be sustained unless the remedy selected has 'no reasonable relation to the unlawful practices found to exist.'"

When contrasted with the other cases decided by this same Judicial Officer, there can be no reasonable relation between petitioner's minor technical violations and the harsh suspension order. When comparison is made between the felonious practices engaged in by these other persons and the minor technical violations of petitioner, there can be no reasonable relation to the enforcement meted out. How can the Government contend that petitioner's suspension has a reasonable relationship to his technical violations, when insolvency, misappropriations, shortages, falsification, etc., did not warrant suspension?

CONCLUSION.

Under Section 1032 of Title 5 U. S. C. the Court of Appeals has,

> "exclusive jurisdiction to enjoin, set aside, suspend (in all or in part), or to determine the validity of, all final orders * * * of the Secretary of Agriculture made under the Packers & Stockyards Act, 1921, as amended * * *".

Under Section 1037 (c) of said Title 5, if a party applies for leave to adduce additional evidence and shows to the satisfaction of the Court (1) that such additional evidence is material and (2) that there were reasonable grounds for failure to adduce such evidence before the agency, the Court, "may order such additional evidence and any counter evidence the opposite parties desire to offer to be taken by the agency."

In the instant case the petitioner prayed:

(1) That he be granted leave to adduce additional material evidence, and, that this cause be referred back to the agency for the purpose of so doing,

(2) That the final order of the Secretary of Agriculture be set aside or suspended permanently under the power vested in the Court of Appeals.

On the basis of the record in this case, there is no legal justification for the suspension order entered by the Secretary of Agriculture and the same should have been set aside by the Court of Appeals.

The Order of the Secretary of Agriculture, which, at best, rests upon most technical grounds, was harsh and oppressive, in that its practical effect is to close the petitioner's long established business, without his having caused loss or injury to a single person with whom he has dealt. The order is grossly excessive when compared with like orders entered in similar cases by the same Judicial Officer of the Secretary of Agriculture.

The questions presented in this petition are of paramount importance in the struggle today between the citizen and his Government. It is, therefore, respectfully urged that this petition for a Writ of Certiorari be granted.

Respectfully submitted,

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Attorney for Petitioner.

APPENDIX.

IN THE UNITED STATES COURT OF APPEALS,

For the Seventh Circuit.

No. 11613 September, 1956 Term—January, 1957 Session

HARRY C. DANIELS, d/b/a HARRY C. DANIELS AND CO.,
Petitioner,
v.
UNITED STATES OF AMERICA and EZRA TAFT BENSON, Secretary of Agriculture,
Respondents.

On Petition for Review of an Order of the Secretary of Agriculture.

March 14, 1957.

Before DUFFY, *Chief Judge,* and FINNEGAN and LINDLEY, *Circuit Judges.*

DUFFY, *Chief Judge.* This is a proceeding to review the validity of an order of the Judicial Officer of the United States Department of Agriculture issued under the Packers and Stockyards Act, 1951 as amended (7 U. S. C. Sec. 181 et seq.). As petitioner was respondent in the administrative proceedings it may avoid confusion to refer to him in this opinion as the respondent, in spite of the fact that he is the Petitioner in the proceedings before this Court.

The Director of the Livestock Division, Agricultural Marketing Service, United States Department of Agricul-

ture, initiated an order of inquiry as to certain practices of respondent, who, doing business as Harry C. Daniels and Co. is registered with the Secretary of Agriculture as a marketing agency to buy and sell livestock on a commission basis at the St. Louis National Stockyards, National Stockyards, Illinois. By engaging in the business of a marketing agency under the Act, respondent is required to comply with the regulatory requirements applicable to that business.

After notice, a hearing was held before a hearing examiner who issued a proposed order. Thereafter, a final order was issued by the Judicial Officer, acting for the Secretary of Agriculture. The Judicial Officer made findings of fact and conclusions of law. He ordered respondent to cease and desist from 1) engaging in the practices and devices found, specifically, to be in violation of the Act and the Regulations, and 2) from violating a prior cease and desist order issued on October 5, 1953 against the respondent. It was also ordered that respondent keep such records and memoranda as will fully disclose all transactions involved in his business under the Act. In addition, the respondent's registration as a marketing agency was suspended for a period of four months. However, the order of suspension was stayed pending the outcome of this petition for review.

For the past twenty-five years respondent has been engaged in the livestock commission business, and he has operated under his trade name of Harry C. Daniels and Co. at the St. Louis National Stockyards for more than twenty years. Respondent's gross sales exceed $5,000,000.00 annually. His customers are primarily small farmers residing in six states in the broad area around East St. Louis, Missouri.

There is no dispute that in the period from October 26, 1953 through August 27, 1954, on 115 separate days, re-

spondent drew a total of 272 livestock drafts aggregating $352,900.54 on his shippers' proceeds bank account. It also is admitted that he endorsed each of said drafts by signing, without any prior authorization, the names of the payees thereon. He then deposited the drafts so endorsed in his personal account in another bank. Respondent remitted the balance of the proceeds to such shippers by checks drawn on his personal account. Respondent also admits that all such payments to shippers should have been by draft on his shippers' proceeds bank account.

Respondent points out that during the audit period, he issued 18,057 shippers' proceeds drafts. He claims that of the 272 drafts in question, 42 were, in fact, payable to respondent under different business names which he used, and that such livestock was to that extent sold for his own personal account. Respondent argues the sanctions imposed were not warranted or justified by the relatively few infractions of the Act and the Regulations. Respondent refers to such violations as trivial irregularities. Respondent also emphasizes that none of his customers lost any money because he remitted by check instead of using drafts on his shippers' proceeds bank account. Respondent explains that the procedure was followed in many instances in order to correct errors that were found in the drafts as drawn.

The Judicial Officer found that from November 1, 1953 to August 31, 1954, respondent assessed and collected unfair and unreasonable feed and shed pen charges from shippers whose livestock he sold on a commission basis by deducting from the proceeds received by him amounts for feed charges where such feed was not supplied, and for feed charges greater than were actually supplied. He also found respondent deducted for shed pen charges in cases where the livestock was not yarded in shed pens, and where the period during which the stock occupied the

pens was different than that represented by the shed charges which respondent deducted. A specific overcharge of $2,176.64 for corn for hog feed was found. The Judicial Officer also found that favored treatment "with respect to feed and shed pen charges was accorded to consignments of cattle which respondent owned or in which he had a financial interest." The respondent failed to comply with the request of the Livestock Division to refund overcharges to the shippers.

The Judicial Officer also found that during the period May, 1954 through January, 1955, respondent "failed to furnish reasonable selling services at the stockyard in connection with cattle consigned to him for sale on a commission basis, * * *." However, the suspension of respondent's registration was based upon the improper shippers' proceeds transactions and on improper feed and shed pen charges.

In arguing the decision of the Judicial Officer was harsh and the penalty excessive, respondent cites twenty-four cases which involved marketing agencies, and which were decided by the same Judicial Officer. In only eleven of these was the registration suspended, and in all but two of the eleven, the suspension was held in abeyance. Respondent insists that the decision of the Judicial Officer herein will put him out of business permanently.

The improper handling and use of the shippers' proceeds is plainly contrary to the Act (7 U. S. C. 1952 ed. Sec. 205, 208 and 213(a)), and of the regulations. (9 CFR Sec. 201.40-201.42.) The argument that there is no evidence of any particular shipper not being paid, is not controlling. It is the duty of a regulatory agency to prevent potential injury by stopping unlawful practices in their incipiency. Proof of a particular injury is not required. *Federal Trade Commission* v. *Raladam Co.*, 316 U. S. 149, 152; *Fashion Guild* v. *Federal Trade Commission*, 312 U. S. 457, 466.

The Packers and Stockyards Act provides for both civil and penal liability for violations of its provisions. The order herein revokes only civil administrative remedies. The suspension of respondent's privilege to trade as a cattle dealer in the St. Louis National Stockyards is an exercise of a power granted to the Secretary of Agriculture to assure a proper adherence to the provisions of the Act. *Cella* v. *United States,* 7 Cir. 208 F. 2d 783, 789; *Nichols & Co., et al.* v. *Secretary of Agriculture,* 1 Cir., 131 F. 2d 651, 659.

Respondent's arguments that the sanctions imposed were excessive would have more force if the violations found by the Official Officer were a first offense. However, the record shows that this is the third violation by respondent with respect to improper handling and use of shippers' proceeds. On April 16, 1945, respondent entered into a stipulation in which he "admitted violating the act and the regulations issued pursuant thereto during the year 1944 by using proceeds received from the sale of livestock consigned to him for sale on a commission basis for purposes of his own and purposes other than the payment of lawful marketing charges and the remittance of net proceeds to shippers." Respondent, in that matter, stipulated to a cease and desist order.

On October 5, 1953, after a hearing, the Judicial Officer found that respondent had violated the stipulation which he entered into on April 16, 1945. Again unauthorized withdrawals and extensions of credit were found which created shortages in respondent's shippers' proceeds account. About the only defense respondent made was that the violations were unintentional. The Judicial Officer did not suspend respondent's registration as a marketing agency, but again ordered respondent to cease and desist from the violations found, and to maintain thereafter a shippers' proceeds account in strict conformity with Sec. 201.42 of the

Regulations under the Act. It was only three weeks after the entry of that order when respondent again began to violate the Act and the Regulations with reference to his shippers' proceeds account.

It is our view, and we so hold, that on the record as a whole, substantial evidence supports the findings of the Judicial Officer, and that his findings are sufficient to support the order issued by him. The Administrative decision as to the remedy should be sustained unless the remedy selected has no reasonable relation to the practice found to exist. *Great Western Food Distributors, Inc.* v. *Brannan*, 7 Cir., 201 F. 2d 476, 484. In view of respondent's previous violations, the order, including the sanctions, should be approved.

There remains for consideration respondent's earnest request that this matter be remanded to the Agency for the purpose of receiving additional evidence. Respondent's present counsel asserts that much evidence was available at the time of the hearing which, for some reason unknown to him, was not there presented.

A proceeding may be remanded to the Administrative agency for the purpose of receiving additional evidence only if, *inter alia*, "there were reasonable grounds for failure to adduce such evidence before the agency * * *." It is also provided that the respondent must show that such additional evidence is material, and that there were reasonable grounds for failure to adduce such evidence before the agency. 5 U. S. C. 1952 ed., Sec. 1037 (c).

The evidence which respondent seeks to introduce has, with a few exceptions, been previously adduced in the Administrative hearing in the same or in a different form. In a large measure, this evidence would be cumulative. But of controlling importance is the fact that respondent has admitted many of the charges which alone would have justi-

fied the suspension of his registration. It is difficult to understand how any such additional evidence would change the result.

The petition for review is denied.

A true copy:

TESTE:

/s/ KENNETH J. CARRICK,
Clerk of the United States Court of Appeals for the Seventh Circuit.